Grieve concluded that the district court abstention had to be sustained not on account of the merits of the district courts ruling but on principle of collateral estoppel.

The Appellate Court reported, at page 154 as follows: *Grieve* at page 154 said:

> . . . Grieve has provided no transcript of or citation to the alleged statement. **Assuming it was said, however, the fact that the Southern District, in addition to making an erroneous ruling, also made an erroneous observation in colloquy** does not relieve Grieve from his failure to appeal its ruling. If Grieve wished to [**12] contend that the district court was wrong, his remedy was to appeal. When he failed to do so, the Southern District's decision became final and, by operation of collateral estoppel, conclusive on the issue of Younger abstention in the Eastern District action also.

Clearly then, Respondent's contention when citing *Copeland* or *Grieve* is misleading and simply not accurate. Simply put, all Appellate Circuits that have addressed the issue of the Hague Convention Petition are on the same page, they all agree and provide a bright line for ALL CIRCUIT COURT JUDGES TO FOLLOW.

Accordingly, when presented with a federal plaintiff asserting a Hague Convention petition, the federal district court must not abstain and must accept and rule on the merits of the petition, unless the federal plaintiff had raised and litigated the matter an underlying state court action, wherein under those conditions, the federal court may appropriately abstain. Clear, cogent guidelines from all of the numerous and unanimous federal Appellate

Courts that have had to rule on the Petitioner's specific issue.

Accordingly, any suggestion of a conflict is simply illusory. There is no conflict whatsoever.

RESPONDENT'S WRIT FOR REVIEW SHOULD BE DENIED AND SAID REVIEW SHOULD BE DECIDED WITH ALL DELIBERATE SPEED.

Given the time frame set forth in the statement of the case it becomes abundantly apparent that this matter has lingered far too long. The child was wrongfully retained in the United States in the later part of 2002, and it is now the end of 2005 and the child is still in the United States and moreover, not even a hearing on the merits has been had.

Asserting the preamble of the Hague Convention wherein it states that, inter alia, underscoring of the need to "*establish procedures to ensure their* (the children's) *prompt return* to the states of their habitual residence . . . ," certainly rings hollow when compared to the instant cases timeline.

Additionally, there is a hollow ring when further compared to Article 12 of ICARA, the United States implementing legislation of the Hague Convention which further states among other matters:

> Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of

> less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned **shall order the return of the child forthwith**. (emphasis mine).

It is noteworthy that the Third Circuit Court of Appeals has already given opinion on the Respondent in this matter (Ms. Yang) had in fact applied less than the one year requirement and yet after over 2 years since her original filing an initial hearing on the merits still eludes her.

CONCLUSION

It is clear that the Appellate Circuits are uniform in their holdings regarding the failure of the Federal abstention doctrines vis-à-vis the Hague Convention. A bright line has been set forth by the numerous Appellate Circuits that have visited this issue, and that any federal district court judge, situate in any district has had and continues to have ample case law upon which to render its decision relevant to the abstention issues.

Additionally, it is clear that PROMPT determinations are set forth in the underlying treaty and ICARA, and accordingly, your Respondent would request a prompt resolution denying the Petitioners writ, and awarding costs and fees for the defense of this matter to the Respondent, for the untenable arguments proposed by the Petitioner and for the filing of such a frivolous writ, your Respondent will ever pray.

Respectfully submitted on this 28th day of December, 2005,

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No. 05-697

In The
Supreme Court of the United States

FU-CHIANG TSUI

Petitioner,

v.

TSAI-YI YANG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Fu-Chiang Tsui (hereafter "Dr. Tsui" or "Petitioner") filed a Petition for Writ of Certiorari on November 29, 2005 (hereafter "Petition"). Tsai-Yi Yang (hereafter "Respondent") filed her Brief for Respondent in Opposition on or around December 28, 2005 (hereafter "Brief").

Respondent's objections to this Honorable Court accepting the instant case are without merit, as will be demonstrated below. Not only do Respondent's arguments contain offensive language, but they contain various errors: legal, factual, and grammatical. Respondent's angry tone should not serve as a distraction to the strong reasons for accepting this case.

The foregoing Reply Brief is filed pursuant to the Rules of the Supreme Court of the United States, Rule 15.6.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Conflict Among The Circuit Courts Of Appeals About Whether The *Younger* Abstention Doctrine And The *Colorado River* Abstention Doctrine Should Even Be Looked At In International Child Abduction Cases.

To summarize the conflict, the common fact pattern is that one parent removes a child from a foreign country and brings the child to the United

States, then filing for custody in a U.S. state court. While the custody action is pending in the state court, the left-behind parent files a Hague petition in a federal court, requesting that the child be returned to the foreign country. The issue becomes whether the federal court has jurisdiction to get involved with the Hague Convention issue.

Two doctrines in U.S. law mandate that a federal court cannot get involved when particular matters are pending in a state court.[1] Some Circuit Courts of Appeals have held that these two abstention doctrines should not be looked at whatsoever,[2] whereas other Circuit Courts of Appeals have held that the two doctrines should be looked into.[3]

In her Brief for Respondent in Opposition, Respondent argues that no conflict exists among the Circuit Courts of Appeals (see pg.7 of Brief). Nevertheless, the cases presented by Petitioner speak for themselves; Petitioner's quotations of the

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[1] These doctrines are the *Younger* and the *Colorado River* abstention doctrines (*Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 [1976]).

[2] *Silverman v. Silverman*, 267 F.3d 788, 2001 U.S. App. LEXIS 21421 (8th Cir. 2001);, *Bouvagnet v. Bouvagnet*, 2002 U.S. App. LEXIS 17661 (7th Cir. 2002); and *Gaudin v. Remis*, 415 F.3d 1028, 2005 U.S. App. LEXIS 14441 (9th Cir. 2005).

[3] *Escaf v. Rodriguez*, 52 Fed. Appx. 207, 2002 U.S. App. LEXIS 25292 (4th Cir. 2002); *Holder v. Holder*, 305 F.3d 854, 2002 U.S. App. LEXIS 18336 (9th Cir. 2002); and *Tsai-Yi Yang v. Tsui*, 2005 U.S. App. LEXIS 15943 (3rd Cir. 2005).

cases are unambiguous (see pgs. 10-12 of Petition). Thus, the conflict among the Circuit Courts of Appeals clearly exists.

Respondent, conveniently enough, fails to discuss any of Petitioner's cases in support of her position that the conflict is somehow illusory. Instead, Respondent simply references the Third Circuit Opinion in the instant case and states that the Third Circuit addressed this conflict in its Opinion.[4]

The Third Circuit's Opinion is not binding on any other Circuit Court of Appeals. It does not overturn the precedential decisions in the Circuit Courts of Appeals that took the opposite position, and it is not binding on the Circuit Courts of Appeals which have not yet reached precedential decisions. The Third Circuit's Opinion simply contributes to the existing conflict by taking a position on one side of this conflict.

The only court to resolve this conflict is this Honorable Court, whose decision is binding on all Circuit Courts of Appeals.

Respondent has failed to undermine the very good reason for accepting Dr. Tsui's Petition for Writ of Certiorari.

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[4] Although the Third Circuit cited the *Silverman*, *Bouvagnet*, and *Gaudin* cases, it never addressed and reconciled the existing split among the Circuit Courts of Appeals. In fact, the Third Circuit erred in its reasoning by relying on the above cases. Whereas the Third Circuit stands on one side of this split, these three cases stand on the other.

II. This Court Should Resolve The Second Conflict Among The Circuit Courts of Appeals About Whether Federal Courts Should Abstain After Applying The Abstention Doctrines.

The second reason for asking this Honorable Court to accept the instant case is to resolve an additional split among the Circuit Courts of Appeals. As indicated above, a group of Circuit Courts of Appeals look at the abstention doctrines in their analysis, whereas another group of circuits does not. With respect to the group that looks at the abstention doctrines, there is an additional split within that group. Some Circuit Courts of Appeals hold that the abstention doctrines require a federal court to abstain from getting involved,[5] whereas other Circuit Courts of Appeals hold that the abstention doctrines permit federal court involvement.[6]

Respondent argues that "all Appellate Circuits that have visited this issue speak with one clear and cogent voice" (see pg.4 of Brief). That unanimous position is that a federal court cannot abstain, unless the Hague Petition was previously brought and litigated in the state court proceeding (Id.).

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[5] *Copeland v. Copeland*, 1998 U.S. App. LEXIS 1670 (4th Cir. 1998); and *Grieve v. Tamerin*, 269 F.3d 149, 2001 U.S. App. LEXIS 22504 (2nd Cir. 2001).

[6] *Escaf v. Rodriguez*; *Holder v. Holder*; and *Tsai-Yi Yang v. Tsui*.

Nevertheless, Respondent's characterization is inaccurate. The Circuit Courts of Appeals are not unanimous in their position. The two cases, *Lops v. Lops*, 140 F.3d 927, 1998 U.S. App. LEXIS 9270 (11th Cir. 1998) and *Copeland*, clearly demonstrate this fact. These two circuit decisions originate out of two different Circuit Courts of Appeals in the same year. The *Lops* case is inconsistent with the *Copeland* case.

In *Lops*, a Hague petition was filed by the left-behind parent in the Superior Court of Columbia County, Georgia (i.e., a state court). *Lops v. Lops*, at 934. After a hearing, the state court judge issued an order transferring the case to the state of South Carolina. *Id.* After having a second hearing on the Hague claim, the Family Court in South Carolina scheduled a third hearing and granted temporary custody to one parent. *Id.* Before this third hearing occurred, the left-behind parent filed another Hague petition in federal court, which then conducted its own hearings on the Hague claim. *Id.*, at 935. The Eleventh Circuit affirmed that the federal district court properly got involved, despite the ongoing Hague litigation in state court.[7]

By contrast, the *Copeland* court reached the opposite position. In *Copeland*, the left-behind parent also raised a Hague petition claim in the state court. *Copeland v. Copeland*, at 4. She subsequently filed a Hague petition in federal court,

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[7] The Third Circuit erroneously cites *Lops* in support of its position (see Appendix at 6a), as *Lops* does not support the principle preceding the citation. In fact, it stands for the opposite principle.

while the Hague claim was still pending in the state court. *Id.* The federal court abstained from getting involved, because of the ongoing Hague litigation in the state court. *Id.*, at 5.

The *Lops* and *Copeland* courts, out of two different circuits, reached contradictory positions on the same facts. Hence, a uniform voice among the Circuit Courts of Appeals does not exist, as Respondent repeatedly asserts.[8],[9],[10]

Even the Third Circuit in the instant case does not recognize a unanimous voice among the Circuit Courts of Appeals (see Appendix at 6a). The Third Circuit does assert that "In a situation where there is a state court custody proceeding and a petition is filed in federal court under the Hague

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[8] It should be noted that Respondent makes a number of characterizations about the Circuit Courts of Appeals without citing any cases in support of her position. The above characterization is a good example.

[9] Respondent also asserts in bold lettering that Petitioner inaccurately quotes *Copeland* (see pg. 8 of Brief). However, Petitioner never quoted the *Copeland* case (see pg. 14 of Petition, the only reference to the *Copeland* case, where *Copeland* is cited, but is not quoted).

[10] Respondent argues that Petitioner somehow misrepresented the holding of the *Grieve* case without adequately explaining the alleged misrepresentation (see pgs. 8-9 of Brief). The federal district court in the *Grieve* case abstained, after applying the *Younger* abstention doctrine. *Grieve v. Tamerin*, 2000 U.S. Dist. LEXIS 12210. The Second Circuit affirmed the district court decision, thereby making the district court decision conclusive. *Grieve v. Tamerin*, 69 F.3d 149, 2001 U.S. App. LEXIS 22504 (2nd Cir. 2001). Thus, Petitioner has not misrepresented the holding of the *Grieve* case.

Convention, but the Hague Convention has not been raised, or raised but not litigated, in the state court, the federal court has generally found that abstention is not appropriate." (Id.) The Third Circuit then *erroneously* cites seven cases in support of this alleged pattern (Id.). The majority of these cases do not support that principle.

The facts of the *Lops* case (one of those seven cases) do not fit this alleged pattern, as the federal court got involved even though the Hague petition was being litigated in the state court. This case is actually a counter-example to the alleged pattern. The cited *Gaudin*, *Silverman*, and *Bouvagnet v. Bouvagnet* (at the circuit level) decisions are not applicable, as these courts held that the abstention doctrines should not be looked at whatsoever in the analysis of whether the federal court should get involved. In *Bouvagnet v. Bouvagnet* (at the district level), 2001 U.S. Dist. LEXIS 17095 (District of Illinois, Eastern Division), the facts do not fit this alleged pattern, as the federal court abstained even though no Hague claim was raised in the state court; this case is another counter-example to the alleged pattern. Only two of these seven cases cited by the Third Circuit appear supportive of the principle preceding it.

Again, the various Circuit Courts of Appeals are not consistent. The clear and growing conflict is not "simply illusory," as Respondent boldly asserts (see pg. 4 of Brief). Petitioner has taken great care to be accurate in characterizing the positions of the various circuits. The conflict is real, and Petitioner is asking this Honorable Court to resolve it.

CONCLUSION

Respondent complains that she has not received a hearing on the merits of her Hague petition, despite filing it two years ago, and that the child has not been expeditiously ordered back to Canada.

First, Respondent could have had a hearing pursuant to her Hague petition two years ago, if she had filed her petition in Pennsylvania state court—the proper forum. Respondent also waited approximately one year before filing her Hague petition. It should also be emphasized that Respondent appealed the case to the Third Circuit, thereby causing additional delay.

Second, Respondent wrongly presumes that the child will be ordered back to Canada ultimately. The child should not be ordered to live in Canada, as Petitioner has not violated the Hague Convention. He has not wrongfully removed nor wrongfully retained the child in the United States.

Petitioner has put forth very strong reasons for this Honorable Court accepting this case, as explained more fully in Dr. Tsui's Petition for Writ of Certiorari. Said Petition is far from frivolous. Respondent has failed to rebut or otherwise undermine these strong reasons, as demonstrated above. Respondent states that the Central Authorities of the United States and Canada are closely watching the instant case (see pg. 6 of Brief). That attention only confirms the importance of this subject. Petitioner respectfully requests this